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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1269

ROBERT BERKSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

Petitioner, Robert Berkson, prays that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Second Circuit, entered on December 17, 1976, which affirmed, without opinion, a judgment of conviction previously entered against him on July 21, 1976 in the United States District Court for the Southern District of New York.

Opinions Below

No opinion was written by the Court of Appeals or by the District Court.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The order of affirmance by the Court of Appeals was filed on December 17, 1976 (Appendix "A" hereto, *infra*, p. 1a [1]). On February 15, 1977 the Court of Appeals denied rehearing (Appendix "B" hereto, *infra*, at 2a), and denied rehearing *en banc* (Appendix "C" hereto, *infra*, at 3a).

This petition is filed within 30 days of the denial by the Court of Appeals of the timely petition for rehearing.

Questions Presented For Review

Rule 801(d)(1)(A) of the Federal Rules of Evidence provides that prior, inconsistent, sworn testimony of a witness may be used at trial as substantive evidence.

In the present case, an indispensable prosecution witness gave trial testimony which exculpated the petitioner. Relying upon Rule 801(d)(1)(A), the trial court permitted the government to read to the jury a portion of the witness's Grand Jury testimony. The Grand Jury testimony consisted of several questions and answers, all of which would have been inadmissible if elicited at trial in the first instance, since they contained conclusions and opinions, failed to specify the reasons for the witness's

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[1] References "1a", *et. seq.*, are to the appendices annexed to this petition.

References "Tr. 1", *et seq.*, are to the trial transcript. A copy of the Appellant's appendix which was filed in the Court of Appeals will be certified to this Court. It contains a substantial portion of the trial transcript, and retains the original pagination.

beliefs, and failed to focus upon the knowledge and activities of the petitioner, as distinguished from the knowledge and activities of others.

When confronted with the apparently inconsistent thrust of his grand jury testimony, the prosecution witness disavowed the accusatorial aspects of that testimony. Nevertheless, the grand jury testimony was received as substantive evidence and the jury was instructed that the witness's grand jury testimony, alone, if believed, provided a sufficient basis to convict the petitioner for knowing participation in mail and stock fraud.

Within the above context, the following questions are presented:

1. Do the proper administration of justice in the Federal Courts and Constitutional due process of law require that before it can be admitted as substantive evidence against a defendant at a criminal trial, the prior inconsistent statement of a government witness, given in an *ex parte* proceeding, must comply with federal evidentiary standards other than the precise hearsay standard which rule 801 (d)(1)(A) of the Federal Rules of Evidence was designed to overcome?

2. Assuming that such prior testimony is admissible as substantive evidence, despite its evidentiary deficiencies, may it be utilized as the sole evidentiary basis for a conviction of the defendant?

Constitutional Provisions And Rules Involved

United States Constitution:

This case involves the due process clause of the 5th Amendment and the confrontation clause of the 6th Amendment, which are set forth in Appendix "D" hereto, *infra*.

Federal Rules of Evidence:

This case involves the following italicized portions of Rule 801 of the Federal Rules of Evidence, specifically subsection (d)(1)(A):

Rule 801.

Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay. A statement is not hearsay if—*

(1) *Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,* or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his

own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The case also involves Rules 602, 611 and 701, which are set forth in Appendix "D" hereto, *infra*.

Statement of the Case

The petitioner was one of several principles of the New York stock brokerage firm of Packer, Wilbur & Co., Inc. During the period from August through December, 1970, various employees of the firm forged customers' names upon stock powers, thus enabling the firm to utilize certain customers' securities for its own benefit. The forgeries were accomplished by or under the supervision of James Gallentine, the firm's cashier.

In June, 1975, more than four years after the underlying events, a Federal Grand Jury in the Southern District of New York returned an indictment naming four individuals as defendants: (1) the firm's president, Wilbur Hyman (who was a fugitive at the time of trial); (2) Maurice Rind, the firm's vice-president; (3) James Gallentine, the firm's cashier; and (4) Petitioner, the firm's secretary.

The indictment charged a number of counts of mail fraud (18 U.S.C. § 1341), stock fraud (15 U.S.C. § 77q [a], interstate transportation of forged securities (18 U.S.C. § 2314) and conspiracy to commit those crimes (18 U.S.C. § 371).

Gallentine entered a plea of guilty to conspiracy and testified as a government witness. Rind and petitioner were jointly tried. A first trial concluded when the jury was unable to agree upon a verdict as to either defendant. The second trial concluded with verdicts of guilty, as to both defendants, upon one count of mail fraud, two counts of stock fraud, four counts of interstate transportation of forged securities, and one count of conspiracy.

Gallentine was an indispensable witness for the prosecution. The stock powers in question were forged and negotiated by him or by various subordinate employees at his direction. Although a number of those subordinate employees testified at the trial, none of them had any dealing with petitioner with respect to those activities.[2]

Gallentine's trial testimony was that he engaged in the fraudulent scheme pursuant to conversations with Hyman and Rind.[3] He made clear that, both in the normal course of his duties and in the execution of the aforesaid scheme, he took orders only from Hyman and Rind.[4] At no time in his trial testimony did Gallentine state that the petitioner had any involvement or contemporaneous knowledge relating to the unauthorized use of customer securities. Indeed, Gallentine denied that during the execution of the scheme he had any conversation with petitioner about forging customer securities, or that petitioner was ever present during such a conversation.[5]

There being no other evidence in the case to establish such knowledge or involvement on the part of the petitioner, the government was permitted, over objection, to

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[2] Tr. 2-5, 6-9, 10-28, 29-30.
[3] Tr. 40-2, 56-8, 71-83, 89-91.
[4] Tr. 33.
[5] Tr. 95-7, 102.

introduce into evidence certain portions of Grand Jury testimony which had been given by Gallentine on June 4, 1973—more than two years after the underlying events and three years prior to trial. (Tr. 97-101, 103).

In order to facilitate discussion of Gallentine's Grand Jury testimony, we have numbered each of the questions:

> [1] "Q. Now, apart from Mr. Rind, did you have any conversation with either of the principals of the company with regard to the use of customers' Leasepac stock for the benefit of the firm?
>
> "A. No, no. Mr. Rind just handled—Mr. Rind set up the transactions, be they sales or loans, and he followed through. Mr. Berkson and Mr. Hyman were aware, yes, but my contact was with Mr. Rind.
>
> [2] "Q. Well, you say that Mr. Hyman and Mr. Berkson were aware. Could you tell us how you know Mr. Hyman and Mr. Berkson were aware of what was going on?
>
> "A. Well, I had conversation with them as to how we got through the day cash-wise, what we had to do in order to get up the amount of cash necessary.
>
> [3] "Q. In other words, from time to time you would tell them that Mr. Rind arranged for the transactions in stock to generate some cash and you provided customers' securities to cover that transaction, and that is how you got the cash on a particular given day?
>
> "A. Yes, yes.
>
> [4] "Q. And you would explain to them that you actually went through the process of the unauthorized use of customers' securities for this purpose?

"A. Yes, yes. I didn't state specifically what accounts or which customers were used but generally, just generally speaking, we were using customers' securities.

[5] "Q. And both Mr. Berkson and Mr. Hyman knew about that?

"A. Yes.

[6] "Q. And the reason you can say that is that you specifically recall telling them about what was going on?

"A. Yes, I spoke to them about it." (Tr. 103-105).

The District Court initially ruled that the Grand Jury testimony was admissible for purposes of impeachment, but reserved decision as to whether it would be received as substantive evidence pursuant to Rule 801 (d) (1) (A) of the Federal Rules of Evidence (Tr. 97-101). Subsequently, however, the Court charged the jury that the testimony was substantive evidence in the case (Tr. 569). Moreover, the trial court instructed the jury that petitioner could be convicted upon the Grand Jury testimony alone.

> "If you believe the testimony of Gallentine to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant even though it is not corroborated by any other evidence." (Tr. 567).
>
> * * * * *
>
> "In essence . . . if you find, for example, that Gallentine was saying the truth when he appeared before the Grand Jury, you may consider that as evidence in the case.
>
> "On the other hand, if you find that he was not, then you will, of course, disregard it or compare it to other statements which were made which indicate that the other statements are true. Those

> are the ones where he said Berkson knew nothing about it." (Tr. 569-570).

The otherwise barren nature of the government's case against Berkson is demonstrated by the prosecutor's statement to the trial court, at the end of the government's case, during the prosecutor's plea that the Grand Jury testimony be received as substantive evidence:

> "Well, your Honor, it seems to me that there is, the very least, a potential problem on the subject of motions to dismiss the case at the close of the government's case without that evidence in the case as substantive evidence." (Tr. 356).

Reasons for Granting the Writ

This case presents important questions concerning the admissibility and sufficiency of evidence in Federal courts, particularly at criminal trials. It calls for an interpretation of a provision of Rule 801 of the recently enacted Federal Rules of Evidence. It is clear that the provision in question will regularly be invoked in criminal trials throughout the Federal system.

A. The Intended and Proper Scope of Rule 801(d)(1)(A) of the Federal Rules of Evidence.

Rule 801(d)(1)(A) of the Federal Rules of Evidence [hereinafter "subsection (A)"] has formally added a new dimension to the character of evidence which may serve as substantive proof of a defendant's guilt. A defendant may now be convicted upon the prior sworn testimony of a witness, despite the fact that the prior testimony was given in an *ex parte* proceeding (and thus, not subject to cross-examination at the time it was given), and despite the further fact that the witness repudiates the testimony at the trial.

The Constitutional foundation for the admissibility of such prior testimony is to be found in *California* v.

Green, 399 U.S. 149 (1970). There, this Court held that the use, as substantive evidence of a prior inconsistent statement does not *per se*, violate the Sixth Amendment right of confrontation. (*California* v. *Green, supra*, 399 U.S. at 158-164).

The theory is that confrontation is preserved since the witness is available at trial to be cross-examined with respect to the prior testimony, and the jury is in a position to assess the credibility of his present rejection of the prior testimony. *California* v. *Green, supra*, 399 U.S. at 159-162.

In ruling upon the Constitutionality of the California procedure which permitted the use of such testimony, this Court specifically distinguished satisfaction of the confrontation requirement from satisfaction of non-constitutional evidentiary standards applicable to *Federal* trials. *California* v. *Green, supra*, 399 U.S. at 163, fn. 15. Indeed, both in Federal and State courts, the majority view has been to prohibit the substantive use of prior inconsistent statements.[6]

Subsection (A) represents, therefore, a substantial break with traditional wisdom as to evidentiary standards in Federal courts. The reason for the former rule was a commitment to evidentiary reliability. The change in the rule does not represent a diminution of that commitment, but rather a reassessment of whether the objective was, in fact, served by the rule. To the extent that particular applications of the new rule would undermine that objective, they should be rejected.

Prior inconsistent statements are usually used by a cross-examiner to impeach a witness. For that purpose, "inconsistency" has usually been given a broad interpre-

[6] The cases are collected in III Wigmore, *Evidence* § 1018 (3rd Ed. 1940) and Annot. 133 A. L. R. 1454, 1455-1457 (1941). See also: *California* v. *Green, supra*, 399 U.S. at 154-155 and at 164, fn. 15.

tation and the cross-examiner has been given a good deal of latitude. We are concerned here with a qualitatively different type of situation. In attempting to use a prior inconsistency as substantive evidence constituting the witness's sole inculpatory accusations against a defendant, the concept of "inconsistency" must be strictly construed, and a determination must be made as to whether the allegedly inconsistent testimony would have been admissible as substantive evidence if given at trial in the first instance.

In the present case, the trial court declined to assess Gallentine's grand jury testimony in those terms, but appears to have followed the impeachment standard in determining the admissibility of the testimony for substantive purposes. We have set out in the margin the colloquy between the trial court and defense counsel, in which it is clear that the trial court refused to apply the other rules of evidence to the prior testimony, but rather, treated the mere fact of apparent inconsistency as the sole criteria for admissibility.[7]

[7] "The Court: I am familiar with the rule, and I know, as I indicated before, that this is a change in this District. Are you aware of any case that says this district still is not affected by the change in the rule, Mr. Brodsky [Defense counsel]?

"Mr. Brodsky: No. This District is certainly affected by the change in the rule. I don't argue that at all, it is plain English. But this is my argument, Judge: Here we have a situation where a witness testifies before the grand jury where there is no lawyer present on the other side, there is no Judge to rule on the propriety of questions——

"The Court: I am aware of your argument, and I would say, as I said months before, that is what you can tell the jury when you get to that point, if you get to that point.

"Under the situation, I find there is substantive use, and I will allow it, with an exception to each defendant.

"I think your argument should be made to the jury rather than as a matter of law. It is not a matter of law." (Tr. 382-383).

By Subsection (A), Congress has created a new function for Grand Jury testimony, and, we submit, the quality of the testimony must be such as to meet the requirements of the function. Unless this is so, subsection (A) will be nothing less than an engine for the destruction of the rules of evidence. The prosecutor could regularly ask his grand jury witnesses unfounded questions, calling for conclusory answers, and then, if the witness disappoints the prosecutor at trial, the grand jury testimony would come in as substantive evidence.

Our review of the draftsman's notes and legislative history with respect to subsection (A) fails to disclose any mention of the problem posed here, i.e., the admissibility of prior inconsistent testimony which does not meet evidentiary standards for reasons other than the fact that it was given on a prior occasion and was not subject to cross-examination. Similarly, in the Second Circuit, where previously inconsistent grand jury testimony had been admissible for many years prior to the enactment of subsection (A), none of the cases decided under that line of authority refer to the problem or involved prior testimony that was incompetent for reasons other than hearsay.[8]

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[8] *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir., 1964); *Taylor* v. *Baltimore & Ohio Railroad Co.*, 344 F.2d 281, 283-5 (2d Cir., 1965); *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir., 1967); *United States* v. *Carella*, 411 F.2d 729, 732 (2d Cir., 1969); *United States* v. *Insana*, 423 F.2d 1165, 1169-70 (2d Cir., 1970); *United States* v. *Classen*, 424 F.2d 494, 495 (6th Cir., 1970); *United States* v. *Mingoia*, 424 F.2d 710, 713 (2d Cir. 1970); *United States* v. *Fiore*, 443 F.2d 112 (2d Cir., 1971); *United States* v. *Small*, 443 F.2d 497, 498-500 (3d Cir., 1971); *United States* v. *Cunningham*, 446 F.2d 194, 198 (2d Cir., 1971); *United States* v. *Panzavecchia*, 446 F.2d 1293, 1297 (5th Cir., 1971); *United States* v. *Briggs*, 456 F.2d 908, 909-911 (2d Cir., 1972); *United States* v. *Ruth*, 461 F.2d 1213 (D.C. Cir., 1972); *United States* v. *Gregory*, 472 F.2d 484, 487-9 (5th Cir. 1973); *United States* v. *Klein*, 488 F.2d 481 (2d Cir., 1973); *United States* v. *Allsup*, 485 F.2d 287 (8th Cir., 1973); *United States* v.

[Footnote continued on following page]

Wigmore touches upon the problem within the context of the discussion of a prior expression of opinion as being an inconsistent statement *for the purpose of impeachment*:

> "The usual case of this kind is that of a general statement upon the merits of the controversy, which is now offered against a witness who has testified to a specific matter. Thus, A testifies for the prosecution that he saw the defendant near the scene of the alleged arson; it is offered to show that he has elsewhere declared that he is sure that the defendant is innocent; is this admissible?
>
> "The usual answer of some courts is that the declaration should be excluded because it is mere opinion (§ 1918, infra). This is unsound (1) because the declaration is not offered as testimony (§ 1018, *supra*) and therefore the opinion rule has no application. . . .***" (IIIA Wigmore on *Evidence*, § 1041, at p. 1052 [Chadbourne Revision]).[9]

B. The Prior Testimony Herein Did Not Satisfy Basic Evidentiary Standards Applicable to Federal Criminal Trials.

An analysis of the Grand Jury transcript which was received in evidence, and upon which the jury was instructed they could convict the petitioner, leaves no doubt that neither the questions that were put to Gallentine, nor

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Pfingst, 477 F.2d 177, 197-198 (2d Cir., 1973); *Northwestern Mutual Life Insurance Co.* v. *Linard*, 498 F.2d 559, 560 (2d Cir., 1974); *United States* v. *Skelley*, 501 F.2d 447, 454-5 (7th Cir., 1974); *United States* v. *Robinson*, 503 F.2d 208, 217 (7th Cir., 1974); *United States* v. *Tavares*, 512 F.2d 872 (9th Cir., 1975); *United States* v. *Rivera*, 513 F.2d 519, 525-528 (2d Cir., 1975); *United States* v. *Jordano*, 521 F.2d 695 (2d Cir., 1975); *United States* v. *Wolfish*, 525 F.2d 47, 461-2 (2d Cir., 1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir., 1975).

[9] See also: *United States* v. *Barrett*, 539 F.2d 244, 254 (1st Cir. 1976).

his answers, would have been admissible if the examination had occurred at trial in the first instance. The six questions and answers are set forth *supra,* at pp. 7-8. We shall here examine them *seriatim.*

> [1] "Q. Now, apart from Mr. Rind, did you have any conversation with either of the principals of the company with regard to the use of customers' Leasepac stock for the benefit of the firm?
>
> "A. No, no. Mr. Rind just handled—Mr. Rind set up the transactions, be they sales or loans and he followed through. Mr. Berkson and Mr. Hyman were aware, yes, but my contact was with Mr. Rind."

The permissible answer to the first question should have been "yes" or "no". If the answer were yes, the witness could have been permitted to go on to give the details of the conversation. Since the answer was "no" it was clearly improper to permit the witness to venture the opinion that petitioner was "aware".

> [2] "Q. Well you say that Mr. Hyman and Mr. Berkson were aware. Could you tell us how you know Mr. Hyman and Mr. Berkson were aware of what was going on?
>
> "A. Well, I had conversation with them as to how we got through the day cash wise, what we had to do in order to get up the amount of cash necessary."

The second question repeats the improper conclusion that the petitioner was "aware", and then, without separating the questions as to Hyman and petitioner, asks how they were aware of what was going on. The answer to the question was improper because, without being specific as to whether the witness was talking about petitioner or Hyman, he was permitted to give testimony as to a conversation, in summary form, without being

required to specify the content of the conversation, and without specifying the time, place or participants.

> [3] "Q. In other words, from time to time you would tell them that Mr. Rind arranged for the transactions in stock to generate some cash and you provided customers' securities to cover that transaction and that is how you got the cash on a particular given day?
>
> "A. Yes, yes."

The third question simply picks up on the prior question, and has the witness reaffirm the answer, again referring to "them", without testifying as to what was said to petitioner and what was said to Hyman, or whether he was talking to them alone or separately. The answer is merely an affirmation of testimony which has been given by the prosecutor, himself. It is difficult to imagine circumstances under which an attorney would be permitted to similarly lead his own witness at trial.

> [4] "Q. And you would explain to them that you actually went through the process of the unauthorized use of customer securities for this purpose?
>
> "A. Yes, yes. I didn't state specifically what accounts or which customers were used but generally, just generally speaking, we were using customers' securities."

The fourth question is improper because it uses the conclusory word "unauthorized", and also because it refers to "them" without stating what the witness said to petitioner or what the witness said to Hyman.

> [5] "Q. And both Mr. Berkson and Mr. Hyman knew about that?
>
> "A. Yes."

The fifth question is improper because it uses the conclusory word "knew", without requiring the witness to make clear as to whether his assent to the question was based upon his personal knowledge, rather than some assumption on his part that petitioner "knew".

> [6] "Q. And the reason you can say that is that you specifically recall telling them about what was going on?
>
> "A. Yes, I spoke to them about it."

The sixth question is improper because it refers to "them", without referring to what was said to petitioner and what was said to Hyman, and permits the witness to answer, "I spoke to them about *it*", without requiring him to state what he said to either man, specifically or when the information was conveyed.

Aside from the obviously objectionable character of the above noted questions and answers, there is a subtle, and thus more devastatingly improper impact which the testimony has when taken as a whole. While some of the questions appear to be attempting to narrow the field created by the prior question or answer, the successive questions and answers have a cumulative, "snowball" effect, picking up pockets of opinion, error, confusion and equivocation, and passing them through to the subsequent testimony.

The witness's answers were conclusory. They constituted equivocal findings of fact, and infringed upon the fact finding function of the jury. The jury, therefore, had to base its findings not upon the raw data of what occurred, but rather, upon speculations as to whether Gallentine's conclusions were accurate.

None of the questions was calculated toward isolating information imparted by the witness to the petitioner. None of the questions or answers shows that petitioner was ever told that customers' names were being forged to

securities, nor do they show whether any information was conveyed to petitioner contemporaneously with the occurrence of the improper conduct or after the fact. The testimony, taken as a whole, does not amount to anything more than an expression of belief that the petitioner was aware of some of the activities that underlie the charges of the indictment. Since no particularized statement of the basis for that belief was elicited from or given by the witness, the testimony was incompetent. *Shepard* v. *United States*, 290 U.S. 96, 104-106 (1933). See also: *United States* v. *Murray*, 297 F.2d 812, 816 (2nd Cir., 1962).

Similarly, if such testimony had been given at the trial in the first instance, it would squarely have conflicted with other provisions of the Federal Rules of Evidence. *Rule 602* requires that before a witness may testify to a matter, his personal knowledge of the matter must first be established. *Rule 701* provides that a witness, other than an expert, may only give testimony in the form of an opinion or inference where a proper foundation is laid *and* where such testimony will clarify the issue. Neither of those conjunctive requirements existed here.[10]

Rule 611(c) provides that leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Cf. Denroache, *Leading Questions*, 6 Crim. L. Q. 21, 22 (1963); 3 *Weinstein's Evidence*, ¶ 611[05] at pp. 611(54-55).

In *Bronston* v. *United States*, 409 U.S. 352 (1973), this Court assessed the scope of liability under the Federal perjury statute, and noted:

> "* * * But we are not dealing with casual conversation and the statute does not make it a criminal

[10] It should be noted that the trial court acknowledged that Gallentine's grand jury testimony involved a characterization of petitioner's "mental operations" (Tr. 99), and was merely ". . . evidence of [Gallentine's] opinion of what [petitioner] knew." (Tr. 100).

act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." (409 U.S. at 357-8) [Emphasis as in original].

Although *Bronston* was not concerned with the issue presented by this petition, the discussion in *Bronston* provides an excellent rationale for the proposition that prior allegedly inconsistent Grand Jury testimony must first meet the condition of being fairly precise and must have a proper foundation before it can be used as substantive evidence in a subsequent trial upon which a defendant's guilt beyond a reasonable doubt will be predicated. Grand Jury testimony need not meet the latter qualification in order to justify a valid indictment. However, if it is to serve its recently enlarged function, it must do so.

As this Court said in *California* v. *Green, supra*, the basis for the use of such testimony as substantive evidence is ". . . the State's 'need' to introduce relevant evidence that through no fault of its own cannot be introduced in any other way." (399 U.S. at 167, fn. 16). The "fault" for sloppy questioning before the Grand Jury, whether intentional or not, must rest with the prosecution. If Federal prosecutors are content to take advantage of the rather liberal standards upon which Federal indictments can be secured, then they must do so with the knowledge that the testimony may not later qualify as substantive trial evidence.

It must finally be noted that the text of subsection (A), itself, requires that the prior testimony be "given under oath *subject to the penalty of perjury*". If the testimony does not meet the *Bronston* standards, then it is not subject to the penalty of perjury, and it does not qualify for admission under subsection (A). Here, Gallentine's testimony was so imprecise that, we submit, he could not have been prosecuted for perjury based upon

the implications which the government sought to draw from that testimony in using it at trial, i.e., that Gallentine participated in or witnessed the communication to petitioner of the fact that customers' names were being forged to stock powers.[11]

C. Even If Admissible As Trial Evidence, the Prior Testimony Herein Should Not Have Been Permitted to Serve as the Sole Evidentiary Basis for the Petitioner's Conviction.

Assuming, *arguendo*, that Gallentine's testimony was admissible for whatever evidentiary worth it might have, we respectfully submit that, standing alone, it was inadequate to sustain a conviction in a Federal Court. There reaches a point where prior testimony, offered for the truth of its contents, is so equivocal and so lacking in evidentiary worth, as to deprive a defendant of any meaningful opportunity to confront the witness. In a situation where the testimony is clear-cut and unequivocal, the witness can, at least, be called upon to give an explanation for his change in testimony, and then the credibility of his explanation may be left for the jury to decide. However, where the prosecutor seeks to argue merely from inferences which he seeks the jury to draw from the prior testimony, the testimony then becomes twice removed from the trial itself.

In its charge, the trial court instructed the jury that the prior inconsistent testimony was "sufficient to convict the defendant even though it is not corroborated by any other evidence." (Tr. 567).

The prosecutor put his finger on the problem in summation by stating the issue as follows:

---

[11] At trial, Gallentine testified that he did not have a discussion with Berkson about the matter until after the firm had stopped doing business, which was long after the underlying events (Tr. 146-150, 162).

"Did Robert Berkson know about it, did Maurice Rind know about it, and did they take part in what was going on" (Tr. 420).

In his rebuttal, the prosecutor analyzed the quality of the truth finding process by which the jury had resolved that issue:

"* * * [W]e are all hearsaying to you, 'Mr. Gallentine said this, this, and this, and if it happens to help, the result will be we rely on it, and if it doesen't, he must not be telling the truth,' and I suppose to some extent we have all done that . . .

"Well, whatever Mr. Gallentine was saying, you will have to decide. * * *" (Tr. 541).

In *California* v. *Green, supra*, this Court noted that ". . . considerations of due process, wholly apart from the confrontation clause, might prevent convictions where a reliable evidentiary basis is totally lacking . . ." (399 U.S. 164, fn. 15). Indeed, in *Green*, while sustaining the admissibility of the prior inconsistent testimony, this Court remanded the case for reconsideration as to whether the testimony provided a sufficient basis for the conviction (399 U.S. at 170, fn. 19, and accompanying text).

That precise thought was expressed in the report of the Senate Committee on the Judiciary with respect to subsection (A):

"It would appear that some of the opposition to this rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate." U.S. Code Cong. & Ad. News, 93rd Cong., 2d Sess., No. 12A, p. 41 (January 15, 1975).

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari ought be granted.

Respectfully submitted,

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Attorneys for Petitioner

APPENDICES

APPENDIX A

Court of Appeals Order of Affirmance

(December 17, 1976)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of December, one thousand nine hundred and seventy-six.

Present: HON. WILLIAM H. MULLIGAN
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VANGRAAFEILAND
Circuit Judges.

76-1348

76-1367

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ROBERT BERKSON, JAMES GALLENTINE, WILBUR HYMAN, MAURICE RIND,
Defendants,

MAURICE RIND, ROBERT BERKSON,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Court of Appeals Order of Affirmance
(December 17, 1976)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX B

Denial of Petition for Rehearing (February 15, 1977)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. MULLIGAN
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

76-1348
76-1367

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ROBERT BERKSON, JAMES GALLENTINE, WILBUR HYMAN, MAURICE RIND,
Defendants,

MAURICE RIND, ROBERT BERKSON,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Robert Berkson,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk
by LLESSA BING, Deputy Clerk

APPENDIX C

Denial of Suggestion for Rehearing *En Banc*

(February 15, 1977)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-seven.

76-1348
76-1367

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ROBERT BERKSON, JAMES GALLENTINE, WILBUR HYMAN, MAURICE RIND,
Defendants,

MAURICE RIND, ROBERT BERKSON,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc havng been filed herein by counsel for the defendant-appellant Robert Berkson, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

APPENDIX D

Constitutional Provisions and Rules

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Evidence, Rule 602.

LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Appendix "D"—Constitutional Provisions and Rules

Federal Rules of Evidence, Rule 611.

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Federal Rules of Evidence, Rule 701.

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Supreme Court, U. S.
FILED
JUN 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-1269

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT BERKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
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Attorneys,
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Washington, D.C. 20530.

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ROBERT BERKSON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals entered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on December 17, 1976. A petition for rehearing with a suggestion of rehearing en banc was denied on February 15, 1977 (Pet. Apps. B and C). The petition for a writ of certiorari was filed on March 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury testimony of a government witness, which was inconsistent with the witness's trial testimony, was properly admitted as substantive evidence at trial.

2. Whether the evidence was sufficient to support petitioner's conviction.

STATEMENT

Following a second jury trial[1] in the United States District Court for the Southern District of New York, petitioner was convicted of one count of mail fraud in violation of 18 U.S.C. 1341, two counts of securities fraud in violation of 15 U.S.C. 77q(a) and 77x, four counts of transporting forged securities in interstate commerce in violation of 18 U.S.C. 2314, and one count of conspiracy in violation of 18 U.S.C. 371. He was fined a total of $25,000 and was placed on probation for five years. The court of appeals affirmed without opinion (Pet. App. A).

1. Petitioner was the corporate secretary and a director of Packer, Wilbur & Co., Inc. (Packer, Wilbur), a Manhattan stock brokerage firm. In August and September of 1970, Packer, Wilbur was in serious financial trouble (Tr. 33-34). As part of its efforts to stay in business, the firm on several occasions misappropriated stock it was holding for its customers. James Gallentine, the firm's cashier and a government witness,[2] had the customers' signatures forged on stock transfer powers and transferred the stock to Packer, Wilbur. The stock was then either sold or used as loan collateral (Tr. 3, 6-7, 11-12, 40-42, 51-55, 59-62, 70-71, 77-80).

In August of 1970 petitioner asked his father to furnish the purchase money for 10,000 shares of Robotguard stock. His father agreed to give him the money, but a few days later petitioner told his father that his help was no longer needed

[1]The jury in petitioner's first trial could not agree on a verdict.

[2]Gallentine had pleaded guilty to one count of securities fraud (Tr. 31). Petitioner was tried together with Maurice Rind, the vice-president and a director of Packer, Wilbur. Rind was convicted on the same counts as those on which petitioner was convicted, and the court of appeals affirmed his conviction (Pet. App. A). Wilbur Hyman, the president of the firm, was a fugitive at the time of the trial.

(Tr. 352-354). At approximately the same time Gallentine misappropriated 10,000 shares of the Robotguard stock of one of Packer, Wilbur's customers (Tr. 67-71). During the summer of 1970, petitioner advised one customer, Mrs. Melling, against selling stock that had already been sold by Packer, Wilbur (Tr. 254-257). In March of 1971 another customer, Mr. Caplan, wrote to petitioner requesting that certain stock be delivered to his account at another firm. The stock was not delivered, and Caplan spoke to petitioner, who said that he would take care of the matter. He never had the stock transferred, however, because it had been sold (Tr. 232-238).

2. Gallentine, the firm's cashier, had testified before the grand jury that from time to time he had explained to petitioner that customers' securities were being used to obtain cash.[3] At trial, however, Gallentine testified that he had mentioned the misappropriation of customers' stock to petitioner only once—when Leasepac, Inc., had declared a stock dividend that some of Packer, Wilbur customers, who thought that they held Leasepac stock, would not receive because they were not shareholders of record. Petitioner was said to have replied that he would speak to Rind, the firm's vice-president, about the problem, and that a record should be kept of who was entitled to the dividend (Tr. 95-97). At that point the government offered Gallentine's grand jury testimony as substantive evidence under Fed. R. Evid. 801(d)(1)(A). Petitioner objected that the testimony would not have been admissible as substantive evidence if the same questions had been asked at trial, and that it should be admitted only for impeachment (Tr. 98-100). At the close of the trial, the court admitted the testimony as substantive

[3]The portion of Gallentine's grand jury testimony that was introduced at trial is set forth at Pet. 7-8.

evidence, and ruled that petitioner could challenge the weight and credibility of the testimony before the jury (Tr. 382-383).

ARGUMENT

1. Although not questioning that Gallentine's grand jury testimony constituted a sworn prior inconsistent statement of the kind Fed. R. Evid. 801(d) declares to be admissible as substantive evidence, petitioner contends (Pet. 9-13) that the testimony should nevertheless not have been received because subject to other deficiencies that would have rendered it inadmissible if it had been given as direct testimony at trial. The courts below correctly rejected this contention and upheld the admissibility of the evidence, subject, as the district court ruled, to petitioner's right to challenge its weight and credibility before the jury.

Petitioner argues that the grand jury testimony was inadmissible because the questions and answers were conclusory, that Gallentine testified as to matters as to which he lacked personal knowledge, and that he gave opinion evidence without a proper foundation in response to leading questions. These arguments are based upon a hypertechnical reading of each question and answer in isolation from the context. In essence, Gallentine simply testified to the grand jury that both petitioner and Hyman knew that he was using customers' securities to raise money, because he told them so. Since what he said to petitioner is obviously a fact within Gallentine's personal knowledge, his testimony that petitioner knew what was going on, even if viewed as containing opinion and inferences, was clearly admissible because it was rationally based on the witness's perceptions. Fed. R. Evid. 701.[4] To the extent that the grand jury

[4]Petitioner's reliance (Pet. 17-18) on *Bronston* v. *United States*, 409 U.S. 352, is misplaced. There, the issue was whether a witness's unresponsive and therefore misleading testimony constituted perjury under 18 U.S.C. 1621 even though the testimony was literally true. Here, the crime of perjury is not involved; rather, the issue is simply whether evidence is admissible at trial.

testimony might be challenged as unspecific as to when the conversations with petitioner occurred and what was said, petitioner had ample opportunity to cross-examine the witness about these matters. He also had ample opportunity to attack the credibility and weight of the testimony before the jury.[5]

2. Petitioner also challenges (Pet. 19-20) the sufficiency of the evidence on the ground that even if Gallentine's grand jury testimony was properly admitted as substantive evidence, petitioner's conviction should not be sustained solely on the basis of that testimony. But there is other substantial evidence which, when viewed, as it must be, in the light most favorable to the prosecution, amply supports the conviction. Gallentine gave direct testimony that on one occasion he told petitioner that some of the firm's customers would not receive a Leasepac stock dividend because the firm had "used" their Leasepac stock. And three other aspects of the evidence gave strong circumstantial support to the jury's inference that petitioner was involved in the scheme. First, as an officer and director of the firm, he could reasonably be deemed to be aware of the firm's financial condition and the means by which the firm was staying afloat. Second, his dealings with Mrs. Melling and Mr. Caplan permit an inference that he knew and was concealing the fact that the firm had sold their stock. Finally, his withdrawal of his request to his father for money

[5]Congress expressly provided in Fed. R. Evid. 801(d) that a trial witness's prior inconsistent grand jury testimony should not be excluded as hearsay. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 15 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 10 (1974). In thus permitting prior statements uttered under oath in non-adversary proceedings to be admitted as substantive evidence, the legislature surely was aware that such extra-trial statements would in many instances not meet the evidentiary requirements applicable in a formal trial.

to buy 10,000 shares of Robotguard stock, after the firm had taken 10,000 shares of that stock belonging to a customer, indicates that he knew of the misappropriation.

Contrary to petitioner's assertion (Pet. 19), the trial judge did not instruct the jury that Gallentine's grand jury testimony was by itself sufficient evidence to convict petitioner. Rather, the court said that Gallentine's testimony as a whole (including his trial testimony) was sufficient evidence upon which to base a conviction (see Tr. 567). Both the district court and the court of appeals considered the evidence to be sufficient. There is no reason for this Court to review further this essentially factual question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys.

JUNE 1977.

DOJ-1977-06